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Department of State

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USPOLAD,

TOKYO

A-442 Dec. 31, 1951

3157

Subject: FCN Treaty with Japan. Mission's despatch 915,
DEC 17.

This, the second of the airgrams dealing with ref. despatch continues Department's reply thereto.

Article VI.

1. The proposed Japanese restatement of the phrase regarding entry and molestation would be acceptable.
2. The words "full equivalent", it may be noted, do not necessarily preclude compensation in kind, provided this compensation meets the tests otherwise stipulated. Although it might be expected that payment in cash would ordinarily be the convenient and efficacious device for meeting the requirements of paragraph 3 as to justness and effectiveness (the general object being that the expropriated owner should be "made whole"), the Department has carefully avoided a wording implying that cash payment is in all circumstances the sole permissible device.
3. The Department would not object to having paragraph 4 carried as a separate Article, as proposed by the Japanese. An appropriate position might be between present Articles V and VI.
4. The Department does not believe anything would be gained by having paragraph 1 listed in paragraph 5, and is not inclined to accept the Japanese proposal to this effect. Paragraph 1 is a simple assertion of an international law principle that stands on its own bottom. It is a logical preface, couched in a traditional form, to the more specific provisions of the Article; and it also serves as a residual basis for treaty protection in situations not expressly or adequately covered by the more detailed stipulations of the treaty. As such, it needs no buttressing by a national

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treatment standard. Moreover, it is the Department's theory that the precise national treatment standard should not be written into a treaty except in relation to particular and clearly definable subject-matter, with respect to which the two Parties can visualize the scope and boundaries of their commitment and can therefore know whether they are in a position scrupulously to undertake it. So far as the content of Article VI is concerned, such subject-matter is that dealt with in paragraphs 2, 3 and the last sentence of 5; on the other hand, "protection" and "security" are rather large and indefinite concepts, with respect to which it would appear imprudent to undertake more than an "in principle" or "international law" type of commitment.

Article X. The reason for the omission of copyright from the treaty is that there exists an expeditious and adequate executive procedure for dealing with bilateral copyright relations: Presidential proclamation, where the requisite reciprocity is established. The competent copyright authorities find it more convenient and expedient to deal with copyright through that procedure than through the medium of a treaty of the present type. Use of that procedure, on the other hand, saves the treaty from becoming involved in technical complications that sometime arise in the copyright field. (FYI, as the Mission is aware, plans are underway for negotiations for the establishment of copyright relations with Japan.)

The Department does not believe that the existence of a multilateral convention concerning a given subject-matter is necessarily sufficient reason, without more, for excluding it from the treaty. (For example, a number of provisions in the commercial Articles parallel materials already in the GATT.) Rather, the FCN treaty should, insofar as practicable, aim to cover in terms of elementary principle the traditional subject-matters and the broad range of economic relations between two countries, so that these relations stand on a durable independent basis. Although, in view of the participation of both countries in the international convention on industrial property, Article X is obviously not indispensable,

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it is a normal and customary feature of an FCN treaty and its omission could lead to suppositions on the part of interested members of the American public that Japan nursed intentions of deviating from the policy of equal treatment set forth therein. To arouse suspicions of this kind would serve no useful purpose.

Article XI (paragraph 5)

1. Department is agreeable to substituting, in clause (a), the words "specific advantages as to taxes, fees, and charges" for the words "specific tax advantages". As to clause (b), the words "special advantages as to taxes, fees and charges" may be substituted for "special tax advantages". This variant of the Japanese suggestion would be in the interest of precision and consistency of reference; and is to be preferred. The unadorned words "special advantages" were permissible in the Colombia treaty because the introductory clause ("Notwithstanding the provisions of the present Article") sufficiently delineated the kind of advantages contemplated.

2. As to clause (c), merely substituting "non-resident nationals" for "non-residents" would materially alter this reservation, one object of which is to permit a limited category of non-resident aliens to be given the same personal exemption privileges as are given non-resident nationals. This limited category, as clearly indicated in the Irish treaty formula, comprises aliens resident in a contiguous country. (Note that the test is the place of residence of the alien; not his nationality). It would be acceptable, if the Japanese desire, to substitute the Irish treaty wording in toto for that in the draft presented to Japan as to this clause.

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USPOLAD,

TOKYO
A-441 Dec. 31, 1951

3156
3156

Subject: FCN Treaty with Japan. Mission's despatch 915,
DEC 17.

For the sake of convenience, Department's reply to ref. despatch will be divided into several airgrams, of which this is the first. It will deal with questions regarding exchange controls, about which the Japanese appear to be especially anxious for an early reply. Each airgram will be forwarded as soon as completed, without regard to any fixed sequence.

Article XII. It is indeed the intent that this Article should, in and of itself, permit reasonable measures needed to safeguard Japan's balance-of-payments position. A primary purpose of the Article is to provide that such measures be formulated and applied in a justifiable and orderly manner, with due regard to all the equities. The Japanese have rightly deduced, however, that the provisions of Article XIV also have bearing on the extent to which Japan would retain freedom of action in the exchange control field.

Article XII is not framed in a manner to afford reservations to the particular rules of non-discrimination set forth in Article XIV regarding the import-export trade. Any reservations to the latter, which may be necessary to allow relief to a country in present or prospective balance-of-payments difficulties, therefore, must be sought elsewhere. In the standard draft, such reservation is found in Article XXI, paragraph 3, which allows each country to maintain its rights under the GATT, of which perhaps the most important is the right to impose discriminatory import-export restrictions on balance-of-payments grounds. Such further provision, if any, as may be required adequately to meet the situation of a particular country is left to be worked out during negotiation. The Department is aware that Japan is a country in which additional provision is likely required, and is therefore prepared to explore with the Japanese

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A-441 Dec. 31, 1951 TOKYO

what may be appropriate in their case. The formulations respectively arrived at in the Israel and in the Uruguay treaties, each of which was tailored to fit the local circumstances, may be used by the Japanese as a starting point for developing a concrete suggestion for discussion. It may be noted that one conspicuous difference between the Uruguay and Israel situations was that the latter has not been a member or an immediately prospective member of the IMF.

Article XIV.

1. It is not correct to suppose that the last sentence of paragraph 1 was especially designed for Japan. This sentence, while superficially novel, actually is to be found in substance in several other treaties, but in a different position and in a more broadly stated form. That is, it has been comprehended by the terms of a general most-favored-nation treatment provision contained in a previous version of the exchange control article - for example, Article XV, paragraph 1, and Article XII, paragraph 2, respectively, of the Uruguay and Israel treaties. In the newer and improved form of the exchange control article, such as proposed to Japan, this general most-favored-nation rule has been abandoned. Therefore, in order to maintain the symmetry of the treaty's provisions with respect to customs treatment, the sentence in question is appropriately added to Article XIV. This furthermore brings the treaty's formulation of Article XIV into closer conformity with the multilaterally approved language of the comparable provisions of the GATT and the ITO Charter (paragraph 1 of Articles I and 16, respectively), both of which explicitly cover the regulation of the means of payment. The reason is obvious; in an age when exchange control frequently overshadows the tariff as a device for hampering and diverting international trade, it is important that the principle of non-discrimination in customs matters be clearly applicable to both.

The wording and scope of Article XIV, paragraph 1 - which deals with most-favored-nation treatment in a broad manner - cannot be presumed to bear out the Japanese supposition that the sentence in

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question "does not limit Japan's right to discriminate against any currency or country in the implementation of quarterly foreign exchange budgets". The discussion above, concerning the question of a balance-of-payments reservation, is therefore pertinent to this sentence as well as to paragraph 2 and paragraph 3 (b).

2 - 4. Department's comment on these points will be sent separately.

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USPOLAD,

TOKYO

A-447, Jan. 5, 1952

Subject: FCN Treaty with Japan. Mission's despatch 915,
HEC 17.

This is the third of the airgrams in reply to ref. despatch.

Article IX.

1. The Department could understand that the proposed provisions on real property might on first impression seem lop-sided. A closer analysis, however, will reveal that in fact genuine reciprocity may be achieved under their terms; and that, accordingly, they do not actually breach the principle that all proposed provisions of the treaty should be based on mutuality. The Uruguayans, the Colombians, the Italians and the Israelis were persuaded of the correctness of this view and were therefore able to accept the Department's initial proposals, as were also in a real sense the Greeks with appropriate recasting of the language to fit it to local circumstances; and before them the Siamese (treaty of 1937). The two cases in which there has been a fundamental revision of the Department's real property formula - Ireland and Denmark - were a consequence less of a feeling that the formula was lop-sided than of local policy in the two countries which rendered them unable to undertake the national treatment commitments involved. In the one case, there was a law, aimed primarily at the British but properly framed as applicable to all aliens, designed to discourage alien acquisition of Irish land. In the other case, there was under consideration the enactment of legislation establishing a special permit system for alien acquisitions, growing out of what Danish experience and Denmark's geographic and demographic circumstances suggested was needed to safeguard Denmark's national security. The common denominator formulae that consequently had to be found in those two cases in order to preserve reciprocity are admittedly something less than ideal, from the viewpoint of all parties concerned.

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The Department has endeavored in the standard draft to formulate proposals on real property coming as close to the national treatment ideal as practical considerations permit. There is reciprocal national treatment on leasing for treaty purposes, notwithstanding any State law to the contrary; there is reciprocal national treatment as to ownership generally, insofar as the State laws permit; there is reciprocal non-application of national treatment on ownership, insofar as Japan wishes to retaliate against citizens and corporations of States which choose to deny national treatment to Japanese. Japan would always be free to assure equalization of rights. Further, see comments in the memorandum annexed to Department's instruction no. 63 of November 1.

The Department doubts whether the Danish treaty formula would be as satisfactory to the Japanese in the United States as the formula of the standard draft. The commitment on leasing is stated in a definitely more precise and categorical manner in the standard draft; the Danish-type formula is more open to interpretation as to just what obligation it imposes, in face of conflicting State laws. The standard draft would in effect reinstitute the rights provided in the 1911 Treaty, which proved of considerable benefit to the Japanese in States imposing disabilities on alien land tenure. The exact extent to which a Danish-type formula would achieve a comparable result would be left to be determined by experience in applying and adjudicating it. (The Mission will appreciate that Denmark might have less reason to be concerned by this fact than might Japan; and the Department less occasion to fear the generation of misunderstandings in the application of the formula to Danes).

The Department suggests that the Japanese carefully reconsider the Department's standard formulation. Should it nevertheless be found fatally defective as it now stands, in the Japanese view, the Department would then wish to explore the possibilities of recasting, restating or modifying it in such way as to render it acceptable.

The Department

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2. As to "enterprises carrying on particular types of activity" in paragraph 4, this wording envisages primarily domestic corporations operating in the fields enumerated in paragraph 2 (first sentence) of Article VII. Thus the broad national treatment rule on acquiring and owning personalty (including, of course, common stock) set forth in the first sentence of paragraph 4, Article IX, cannot become a loophole through which the reservations of Article VII, paragraph 2, may be circumvented.

Some examples: Under federal law, aliens may not own more than 25% of the stock of a corporation engaged in domestic radio-broadcasting ("communications"), or of a corporation engaged in domestic air transport, or in coastwise shipping (air and water transport). A recent compilation indicates that the laws of Minnesota and Nebraska limit alien participation in agricultural and mining corporations to 20% and 49% respectively (exploitation of natural resources). As to deposit banking, the directors of National Banks must be all citizens, owning adequate qualifying shares; and State laws often have citizenship requirements, of varying degrees, as to the directors of State banks. It is understood that various State banking commissioners may use their administrative authority to restrict and limit the degree to which aliens acquire controlling interests in state banks; and that the present trend of policy is to frown on aliens' establishing control of domestic deposit banks.

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